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No. 484 No. 485

IN THE

Supreme Court of the United States

October Term, 1965

JAMES D. NOLAN,

Appellant,

vs.

JAMES A. RHODES, Governor of Ohio; ROBERT W. TRACY, Auditor of State of Ohio; FRED W. BROWN, Secretary of State of Ohio,

Appellees.

RICHARD M. ELY, [illegible] CASE, FRANCIS D. LYON, ROBERT W. HUSON, JR., ROBERT A. RYAN, EDWARD F. WESTON, GEORGE CHRISTOPH,

Appellants,

vs.

HARRY BEAM, [illegible] LLOYD E. ROUSH, and LEO TOMLINSON, individually and as members of and comprising the Board of Elections of Adams County, Ohio; WILLIAM DEARTH, MERL RAY, L. F. HUBER, and E. W. HUBBARD, individually and as members of and comprising the Board of Elections of Brown County, Ohio; HARRY TAYLOR, [illegible] COLLIER, CLIFFORD HUDSON, and O. T. FERN, individually and as members of and comprising the Board of Elections of Highland County, Ohio; LAWRENCE R. DEGER, JOHN M. REED, [illegible] and RAY McLAUGHLIN, individually and as members of and comprising the Board of Elections of Clinton County, Ohio; JAMES A. RHODES, Governor of Ohio; ROBERT W. TRACY, Auditor of State of Ohio; FRED W. BROWN, Secretary of State of Ohio,

Appellees.

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IN THE

Supreme Court of the United States

October Term, 1963

No. 454

JAMES D. NOLAN,

Appellant,

vs.

JAMES A. RHODES, Governor of Ohio; ROGER W. TRACY, Auditor of State of Ohio; TED W. BROWN, Secretary of State of Ohio,

Appellees.

No. 455

LEONARD M. SIVE, ELIZABETH R. CASH, FRANCES D. LYON, ROBERT W. HILTON, JR., ROBERT A. RYAN, HARRIS K. WESTON, MORSE JOHNSON,

Appellants,

vs.

HARRY ELLIS, EARL MATHENY, LLOYD S. ROUSH, and LEO TUMBELSON, Individually and as members of and comprising the Board of Elections of Adams County, Ohio; WILLIAM DRAKE, MARK DAY, L. F. HUBER, and R. W. BUCHANNAN, Individually and as members of and comprising the Board of Elections of Brown County, Ohio; HOMER VANZANT, E. I. COLLIER, CLIFFORD HUDSON, and C. F. FARIS, Individually and as members of and comprising the Board of Elections of Highland County, Ohio; LAWRENCE R. LYONS, JOHN M. REED,

GEORGE W. BEHYNER, and RAY McLAUGHLIN, Individually and as members of and comprising the Board of Elections of Clinton County, Ohio; JAMES A. RHODES, Governor of Ohio; ROGER W. TRACY, Auditor of State of OHIO; TED W. BROWN, Secretary of State of Ohio,

Appellees.

BRIEF FOR APPELLEE

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of this Court, Appellees move that the final judgment of the District Court (where the two cases, *Nolan v. Rhodes*, Case No. 454,, and *Sive v. Ellis*, Case No. 455, were consolidated for hearing) be affirmed on the ground that the federal questions presented in this appeal are so unsubstantial as not to warrant further argument, or, in the alternative, that this appeal be dismissed for the reasons set out in the opinion of the District Court (Appendix A, Jurisdictional Statements in *Nolan v. Rhodes*, No. 454, and *Sive v. Ellis*, No. 455). See also, 218 F. Supp. 953 (1963).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions here under attack, Article XI, Ohio Constitution, are set forth in Appendix B of Appellant's jurisdictional statement in *Nolan v. Rhodes*, No. 454, and in Appendix C of Appellants' jurisdictional statement in *Sive v. Ellis*, No. 455. These provisions are here briefly summarized for the Court's convenience.

The system for apportioning seats in the Ohio Senate is based as nearly on population as may be practicably achieved. The State Constitution provides for a Senatorial ratio equal to one thirty-fifth on the population of the state

at each succeeding decennial Federal Census. In the Constitution of 1851, thirty-three Senatorial districts were created by descriptions along county lines, each of which then contained such ratio.

Under a formula of joinder of adjacent districts, where a district's population fell below three-fourths of a ratio, such joinder being accomplished as necessary following each decennial Federal Census, the more thinly populated districts have grown substantially in area in order to keep each district's population equal to at least three-fourths of a ratio. The formula provides for the detachment of a county into a separate district when it attains a full ratio, provided that a full ratio is left in the district from which it is detached.

There is no limit on the number of Senators a single district may elect as its population comes to equal two or more ratios.

Fractions over such ratio or ratios are multipled by five at each decennial apportionment, and if the product is equal to one or more ratios, additional senators, equal in number to such additional ratios, are apportioned among the several biennial sessions of the decennial period. In the current (105th) session of the General Assembly, three Senatorial districts benefit by the three-fourths ratio provision mentioned above. The aggregate population of these three districts in the 1960 Federal Census was 782,552, or an average of 260,851 per senator.

In the same session Cuyahoga County (residence of the Appellant in Case No. 454) six senators represent a population of 1,647,895, or an average of 274,648 per senator. This three-fourths ratio provision thus effects a *de minimus* departure from a representation in the Ohio Senate on an *exact* population formula.

In the House of Representatives each county is initially given a representative*. As the population of a county increases, relatively to the state population, those counties having a population equal to one and three-fourths ratios are given two representatives, and counties having three or more ratios are given one representative for each such ratio.

Fractions over the ratio authorize representatives over the decennial period under a formula identical to that described above in the case of the Ohio Senate.

There is no limit on the number of representatives a county may elect as its population increases, and there is no limit on the aggregate membership of the Ohio House of Representatives.

STATEMENT OF THE CASE

This is a class action for declaratory judgment and injunctive relief brought under the Civil Rights Act, 28 U.S.C., 1343, in Case No. 454, against the Governor, the Auditor of State and the Secretary of State of Ohio, who, under Article XI, Ohio Constitution, have the ministerial duty to make a reapportionment of both houses of the Ohio General Assembly following each decennial census under the formula above described, a formula which has never been ignored or violated.

Other defendants below in *Sive v. Ellis*, Case No. 455, in addition to the state officials listed above, are members of the Boards of Elections of four counties which have populations less than one-half of said one percent ratio, and

*Prior to the amendment of the apportionment formula in 1903 a county was given a separate representative only if it had a population equal to one-half ratio, a ratio being one percent of the population of the state. Less populous counties were joined into districts under an arrangement similar to that in the case of the Senate, described above.

hence benefit from the proviso in Section 2, Article XI, which gives each county a representative regardless of population.

The complaint, both in *Nolan v. Rhodes* and in *Sive v. Ellis*, is based on a claimed disparity in voting power as between electors of the more populous counties and those of the least populous counties.

Prior to November 3, 1903, the State of Ohio comprised eighty-eight counties (as it now does) and the population of the State according to the Federal Census of 1900 was so distributed that ten counties had a population of less than one-half the representative ratio. In the apportionment of 1901 those ten counties were combined with each other and with six other counties so as to create eight representative districts each comprising two counties. In 1903, by virtue of the adoption of the proviso in Section 2, Article XI, Ohio Constitution, each of said ten counties became entitled to separate representation. This formula has since been followed.

By virtue of that constitutional provision, Cuyahoga County in 1962, elected seventeen representatives in the Ohio House of Representatives (or one for each 96,935 of population) while the smallest county in the state, Vinton County, with a population of 10,274, elected one representative in the Ohio House of Representatives.

Forty-eight counties, each having a population equal to less than one-half ratio, elected 48 of the 137 members of the House of Representatives in the 105th Ohio General Assembly.

The challenged formula was adopted at the November general election of 1903, with bi-partisan support, by a vote of 98 percent to 2 percent.

PROCEEDINGS BELOW

In December 1962, trial was had before a three-judge District Court convened in the Southern District of Ohio, Eastern Division, on (1) wholly stipulated evidence, limited solely to statistical data and (2) the briefs and oral arguments of counsel.

On June 12, 1963, the three-judge District Court entered an order dismissing the Appellants' complaints in both *Nolan v. Rhodes* (No. 454) and *Sive v. Ellis* (No. 455). See 218 F. Supp. 953 (1963).

No evidence offered by any party was excluded in the trial of the case.

OPINION BELOW

The opinion of the three-judge District Court, announced by Circuit Judge Paul C. Weick, was unanimous. That opinion is set out in Appendix A in the jurisdictional statement in both cases now pending an appeal in this Court, viz. *Nolan v. Rhodes* and *Sive v. Ellis.*

In that opinion the District Court found the Ohio apportionment system to be wholly rational and devoid of any invidious discrimination for these reasons:

1. It is a system of checks and balances, among varying political, social, philosophical and economic interests, in which neither the urban majority nor the rural minority is given such all-out legislative control as to be able to ride roughshod over the will of the other. Rather, the *ultimate* control of the state legislative process, and of the state constitution making process, is given to the majority of the whole people of the state, processes in which the principle of one individual-one vote is faithfully followed.

2. In the achievement of that system of checks and balances it is not irrational to allow one representative for each county, regardless of population, in one house of a bicameral state legislature.

ARGUMENT

We consider the tests here applicable to be those stated in *Baker v. Carr*, 369 U. S. 186 (1962) (1) that "Universal equality is not the test; there is room for weighting.", (2) that "the prohibition of the Equal Protection Clause goes no farther than invidious discrimination,", and (3) that any discrimination must further a rational state policy; and further (4) that, as stated in *McGowan v. Maryland*, 366 U. S. 420 (1961), "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Appellants seek to set aside the system of checks and balances in the law-making process which presently obtains in Ohio, and they claim themselves unable to conceive that state of facts which we think the Court may consider such as to justify that system.

The record herein will show *no evidence whatever* of a state legislative product in the least way discriminatory to Appellants or the class they represent. Rather, Appellants reply upon (1) an arithmetic variance in the popular constitutencies of members in one house only of the Ohio General Assembly, and (2) an effort (in questionable taste) to paint that arrangement (merely one factor in the over-all system of state government) as an unfair political scheme conceived and thrust upon the people of Ohio by a political figure dead these sixty years. (Not only is there no evidence of record of Mr. Hanna's connection with the amendment in question but such evidence as is available indicates that the proposal received the overwhelming majority given it (98 percent to 2 percent) because of the endorsement given it by both the major political parties. See the remarks of Mr. Starbuck Smith, a delegate from Hamilton County in the Ohio Constitutional Convention of 1912. 2 Debates (1912) 1366).

We submit that the demonstration of a lack of rationality in a state system of legislative apportionment cannot be so simply done as Appellants suppose.

In the jurisdictional statement in *Nolan v. Rhodes* (page 4) the Appellant quotes the proviso in Section 2, Article XI, Ohio Constitution, "Provided, however that each county shall have one representative,", and continues:

> "It is only these nine words which the Appellant claims deprive him of his constitutional rights."

We suggest, rather, that *the whole state system of lawmaking* in Ohio should be examined by the Court in the process of judgment of a single facet of that system, the proviso here under attack, this in order to see that single facet in the perspective of its purpose, operation and effect.

That examination we propose now to make.

THE OHIO SYSTEM OF STATE GOVERNMENT IS UNIQUE

Because claims have been advanced by Appellants, largely by way of the "percentage arguments" based on the population figures of unidentified counties and districts, that the Ohio arrangement is (1) a "crazy quilt" and is (2) lacking in a rational design, plan or standard, we are impelled first of all to point out *in specific terms* just what the Ohio plan or standard of apportionment is. The mere statement, step by step, of this plan or standard in such terms will, we believe, plainly show its complete rationality.

A. The Constitutional Standard.

Article XI, Ohio Constitution, provides for apportionment of representation in the General Assembly as follows:

(1) Each county, regardless of population, is apportioned *five* representatives in the House over the decennial period. Section 2, Article XI.

(2) Each county having a population equal to one and one-fifth ratios is apportioned one additional representative in the House, or *six* representatives in all, over the decennial period. Section 3, Article XI.

(3) Each county having a population equal to one and two-fifths ratios is apportioned two additional, or *seven* representatives in all, in the House, over the decennial period. Section 3, Article XI.

(4) Each county having a population equal to one and three-fifths ratios is apportioned three additional representatives, or *eight* representatives in all, in the House, over the decennial period. Section 3, Article XI.

(5) Each county having a population equal to one and three-fourths ratios is apportioned five additional representatives, or *ten* in all, in the House, over the decennial period. Section 2, Article XI.

(6) Each county having a population equal to two and one-fifth ratios is apportioned six additional representatives, or *eleven* representatives in all, in the House, over the decennial period. Section 3, Article XI.

(7) Each county having a population equal to two and two-fifths ratios is apportioned seven additional representatives, or *twelve* representatives in all, in the House, over the decennial period. Section 3, Article XI.

(8) And so the formula continues progressively, by one-fifth ratio steps, until Cuyahoga County, with sixteen and four-fifths ratios, is apportioned seventy-nine additional representatives, or *eighty-four* representatives in all, in the House, over the decennial period. Section 3, Article XI.

(9) There is no constitional limitation on the number of representatives a county may gain in the House by a pro-

gressive increase of its population in relation to the state population as a whole. Section 3, Article XI.

(10) In the Ohio Senate, which has a voice co-equal to that of the Ohio House in the legislative process, the state is apportioned solely (with the *de minimus* exception noted above) on the basis of population, with the result that this body may be completely controlled by the class which Appellants purport to represent. Sections 6, 7, 8, 9 and 10, Article XI, Ohio Constitution.

This is not a crazy-quilt plan of apportionment.

This is a plan of apportionment which, in the Ohio House, is (1) based on population, with (2) a "floor" under the representation of the less populous counties but without (3) a "ceiling" over the representation of the more populous counties; and (4) in the Senate, with complete control made available to the eight most populous counties, if they want to exercise such control.

This plan, considering the Ohio House apportionment alone, is not only identical in principle with the apportionment of the United States in the Federal House of Representatives (Article I, Section 2, Clause 3, U. S. Constitution) where no "compromise" for the equal representation of the "sovereign" states was involved, but it is vastly more rational than the equal suffrage of the states in the United States Senate. (Article 1, Section 3, Clause 1, U. S. Constitution.)

B. State Constitutional Procedural Provisions Which Protect the Urban Majorities in Ohio

(1) The Ohio Constitution can be amended only by a majority vote of the electors voting on the proposal to amend. (Sections 1 and 3, Article XVI, and Section 1b, Article II, Ohio Constitution.)

(2) Proposals to amend the Ohio Constitution can be submitted to a vote of the electors of the state by initiative petition (Section 1a, Article II, Ohio Constitution) or by joint resolution of the General Assembly (Section 1, Article XVI, Ohio Constitution).

(3) Laws can be initiated by petition and referred to a vote of the electors, a majority of those voting thereon can enact or reject the same, and such laws are not subject to the veto power of the governor. (Section 1b, Article II, Ohio Constitution).

(4) All laws except those providing for tax levies, appropriations for the current expenses of the state and emergency laws (Section 1d, Article II, Ohio Constitution) are subject to a referendum submitted to a vote of the electors by a referendum petition. (Section 1c, Article II. Ohio Constitution.)

(5) It is mandatory that each twenty years there be submitted to the electors of the state the question of calling a constitutional convention, and a majority of the electors voting on said question is sufficient to call such convention. (Section 3, Article XVI, Ohio Constitution). This mandate has never been ignored.

(6) The members of any such constitutional convention are elected as the "general assembly, at its next session, shall provide, by law" (Section 3, Article XVI, Ohio Constitution).

(7) In the enactment of any such law (or of any other state law, for that matter) the Ohio Senate, which may be completely dominated by the voters of the eight most populous counties; has a voice co-equal with that of the Ohio House of Representatives. (Section 9, Article II, Ohio Constitution).

(8) A majority vote of the electors is sufficient to elect the governor of the state (Section 3, Article II, Ohio Constitution), and the governor is given a veto power over laws passed by the general assembly (Section 16, Article II, Ohio Constitution).

C. Constitutional and Statutory Substantive Provisions Which Protect the Urban Majorities.

(1) All municipal corporations in Ohio have constitutional authority, *independent of the state general assembly*, to "exercise all powers of local self-government" (Section 3, Article XVIII, Ohio Constitution).

(2) A similar power of home rule may be attained by a vote of the electors of any county (Section 3, Article X, Ohio Constitution).

(3) Provision is made by statute for the incorporation of populous unincorporated areas (Chapter 707., Revised Code) and for the annexation of such areas to existing municipal corporations (Chapter 709., Revised Code), whereupon the inhabitants of such areas automatically achieve the right of independent municipal "home rule" described above.

D. The Totality of Urban Protection.

From all of these circumstances we can readily see that the totality of protection which Ohio provides to the urban majorities is truly impressive.

This urban majority, the class which the Appellants purports to represent, have been given by the Ohio Constitution and laws these protective benefits:

They can (1) control the Ohio Senate which has a voice co-equal with the Ohio House in the passage of laws, (2) control and election of the governor who is given a veto

power over such laws, (3) approve or reject proposed amendments to the state constitution, (4) enact or reject initiated laws, (5) reject, by the referendum, laws passed by the general assembly, (6) dominate (by providing the majority of needed signatures) the initiation of proposals to amend the constitution, (7) approve or reject, at each twenty year period, in a mandatory election, the proposal to call a constitutional convention, (8) through the Senate, exercise a veto power over laws providing how such a constitutional convention shall be elected, (9) if they reside in a municipal corporation, exercise all powers of local self-government independently of the state legislature, and (10) if they do not so reside, they may attain such powers either by incorporation or annexation.

This urban majority *is not caught in the strait-jacket* which the Court found in *Baker* to be the case in Tennessee! In Ohio this urban majority is free to participate more fully in the law-making process than in any state in the Union, and it already enjoys (or can attain) such degree of constitutional liberty of home rule as has been said (13 Western Reserve Law Rev., at 705) to exist "nowhere else in the United States."

Hence we say again that when we consider the totality of benefits and protection which Ohio affords these urban interests, and which cannot be withdrawn from them without their consent, we are compelled to conclude that the situation in Ohio is unique among all of the states of the Union, and that the cases at bar are unique among all of the apportionment cases pending throughout the United States.

When we consider, in addition to all of this, that (as pointed out in the opinion of the District Court, 218 F.

Supp. at 957) the electors of the twenty counties containing the largest cities of the state actually now elect a majority of the House, then this lawsuit is seen for what it really is, i.e., a grasp for that final degree of control of the state legislative power as will enable these urban interests to ride roughshod over all other interests in the state. Such a concentration of legislative power would defeat the very purpose of the bicameral legislative system, and it is the complete antithesis of the whole object of representative democracy.

We think the Court may well conclude that a state system which prevents such complete concentration of legislative power in the urban voters, but which nevertheless affords such voters not only a dominant voice in the state legislative process, and constitutional home rule as well, is entirely rational, and that it is within the constitutional power of a majority of the electors of a state to establish and maintain such a system.

THE OHIO SYSTEM IS THE RESULT OF POPULAR CHOICE

That this is so is evinced by these facts:

(1) The proviso here under assault was adopted in 1903 by a popular vote of 98 percent to 2 percent.

(2) In the Ohio Constitutional Convention of 1912, a proposal to repeal the proviso was tabled. 2 Debates (1912) 1690.

(3) In 1932, in a state-wide election, made mandatory each twenty years (Section 3, Article XVI,), the proposal to hold a state constitutional convention was soundly defeated.

(4) The same proposal was defeated in 1952 by a popular state-wide vote of almost 2 to 1. In this 1952 election

the vote in Cuyahoga County (the residence of the Appellant in Case No. 454) was "yes", 230,065, and "no", 297,844. In Hamilton County (the residence of the Appellants in Case No. 455) the "yes" vote was 113,243, and the "no" vote was 174,752.

In *every* county in the state the "no" votes exceeded the "yes" votes.

THE RATIONAL PURPOSE OF THE OHIO ARRANGEMENT

In Welsher's "The Political Safeguards of Federalism" (Principles, Politics and Fundamental Laws, 49, 50, (1961)) reference is made to the need for "government responsive to the will of the full national constitutency, without loss of responsiveness to lesser voices, reflecting smaller bodies of opinion, in areas that constitute their own legitimate concern."

We suggest that a similar need may exist within a populous state such as Ohio, with its widely diversified social, economic, philosophical and political interests.

We suggest that an apportionment arrangement which in one house of a bicameral legislature, gives one representative to each of forty-eight less populous countries (and it is only this representation that is here under attack) of a total membership in that house of one hundred thirty-seven, *may well be designed to meet that need.* When it is considered that this arrangement is a single facet of the whole state constitutional scheme of law-making in which the *ultimate* control resides with the majority of the electors of the state as a whole, we can scarcely conclude that in meeting this need the state of Ohio has been guilty of "odiously offensive" discrimination against any of her citizens.

CONCLUSION

For the reasons set out above, and in the opinion of the District Court, we consider that this appeal presents no substantial Federal question, and that the judgment of the District Court should be affirmed or the appeal dismissed.

Dated: Columbus, Ohio, September 23, 1963

Respectfully submitted,

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PROOF OF SERVICE

I, Hugh A. Sherer, one of counsel for Appellees, and a member of the bar of this Court, hereby certify that on the ..... day of October, 1963, I served copies of this motion and memorandum on each of the Appellants herein by mailing the same by U.S. Mail, postage prepaid, to their attorneys, Kenneth G. Weinberg, Stewart R. Jaffy and Jerome Goldmar

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